

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VERLENE E. MAHOLMES

Claimant

VS.

THE BOEING COMPANY

Respondent

AND

**INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA**

Insurance Carrier

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Docket No. 1,019,666

ORDER

Claimant appeals the January 30, 2006 Award of Administrative Law Judge John D. Clark. Claimant was awarded a 5 percent impairment to her right arm, but denied benefits for alleged injuries to her left upper extremity, her shoulders and neck and for myofascial pain syndrome. The Appeals Board (Board) heard oral argument on May 9, 2006.

APPEARANCES

Claimant appeared by her attorney, Russell B. Cranmer of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

What is the nature and extent of claimant's injuries? More particularly, did claimant permanently aggravate her upper extremities as a result of the injuries suffered on September 27, 2004, and every day thereafter through May 15, 2005? Claimant continues

to work for respondent at a comparable wage. Therefore, her award is restricted to a permanent partial disability based upon her functional impairment.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 5 percent impairment to the right upper extremity for the carpal tunnel syndrome and a 3 percent impairment to the whole body for the bilateral shoulder crepitus diagnosed by both Paul S. Stein, M.D., and Pedro A. Murati, M.D., and combining the impairments, claimant is entitled to receive permanent partial general disability benefits under K.S.A. 44-510e for a 6 percent whole person functional impairment.

The Award sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. Except as noted herein, the Board adopts those findings and conclusions as its own.

Claimant originally began working for respondent in 1980. She suffered injuries in 1991 to her wrists, elbows, arms and shoulders. Her treatment was provided by Paul D. Lesko, M.D. Dr. Lesko, in his letter of May 12, 1992, rated claimant at 5 to 10 percent impairment to each forearm and wrist for the myofascitis and restricted claimant from lifting over 20 to 25 pounds, prohibited the use of power tools and limited repetitive grabbing and grasping.² Claimant settled her workers compensation claim against respondent and was awarded a 31 percent permanent partial work disability and restricted from working for respondent.

However, in 1996, the restrictions of Dr. Lesko were modified to allow claimant to return to work with respondent.³ At that time, claimant was limited to occasionally lifting up to 50 pounds, a restriction that respondent was able to accommodate.⁴ Claimant returned to work with respondent performing regular duties, which required the use of heavy equipment, although there is no information to indicate she exceeded her restrictions during this time.

¹ K.S.A. 44-510e.

² R.H. Trans., Resp. Ex. 1.

³ R.H. Trans., Resp. Ex. 1; R.H. Trans. at 15-16.

⁴ R.H. Trans. at 11.

On September 27, 2004, while picking up a heavy drill, claimant felt a “really bad” sharp pain in her neck. She also developed problems with her shoulders and upper extremities. Claimant reported her injuries to her supervisor and was referred to Boeing Medical for in-house physical therapy. Nerve conduction studies performed on October 4, 2004, revealed mild right carpal tunnel syndrome.

Claimant was referred to Dr. John Estivo on November 1, 2004, for physical therapy and medications. Claimant was ultimately released by Dr. Estivo with restrictions on February 28, 2005.

Claimant was referred by her attorney to Dr. Murati for an examination on March 28, 2005. Dr. Murati diagnosed bilateral carpal tunnel syndrome and myofascial pain syndrome at the bilateral shoulder girdles into the cervical paraspinals. He found moderate AC joint crepitus bilaterally. Dr. Murati assessed claimant a 21 percent whole person impairment under the fourth edition of the *AMA Guides*⁵ for her work-related problems, although he testified the ratings did not include the myofascitis. Dr. Murati’s diagnosis of bilateral carpal tunnel syndrome was questioned, as the nerve conduction studies on claimant were only done on the right at that time. Dr. Murati, when asked about the tests, stated that “there may be some indications that there is left carpal tunnel syndrome.”⁶ He also acknowledged he had no information regarding any preexisting impairment claimant may have had from past injuries. Dr. Murati further acknowledged that if Dr. Lesko’s medical records were provided to him, his opinion may change.⁷

Claimant was referred by the ALJ to board certified neurological surgeon Paul S. Stein, M.D., for an independent medical examination on June 8, 2005. Dr. Stein diagnosed claimant with right carpal tunnel syndrome, bilateral shoulder crepitus and mild tenderness at the epicondyles. He determined the only new impairment to be assessed to claimant was the carpal tunnel syndrome to the right upper extremity. He found no condition deserving of a rating in the cervical spine. The remaining ratings for conditions in the upper extremities and shoulders were no greater than the conditions diagnosed and treated by Dr. Lesko for the 1991 injury. However, on cross-examination, Dr. Stein agreed that he was not clear as to what parts of the upper extremities Dr. Lesko rated. Dr. Stein also admitted that there was no evidence of preexisting crepitus in claimant’s shoulders. Dr. Stein adopted the earlier restrictions of Dr. Lesko. In addition, Dr. Stein recommended that claimant’s work at or above shoulder level or with her hands more than 18 inches from

⁵ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

⁶ Murati Depo. at 18.

⁷ Murati Depo. at 23.

the body be limited to less than 10 minutes at a time and less than a total of 2 hours in an 8-hour day.⁸

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.⁹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹⁰

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.¹¹

It is undisputed that claimant suffered a work-related injury on September 27, 2004. The Board also finds that claimant's condition continued to worsen from her daily work activities through May 15, 2005. The ALJ, in the Award, limited claimant's recovery to an injury to her right upper extremity only for the carpal tunnel syndrome. The Board acknowledges the carpal tunnel syndrome appears to be limited to the right upper extremity, as the NCTs were only positive on the right side. It is unclear from this record if the left upper extremity was even tested. However, in workers compensation matters, it is the claimant's burden.¹² The Board finds claimant has failed in her burden of proving a carpal tunnel syndrome condition to her left upper extremity from the job and affirms the ALJ's finding that claimant suffered a 5 percent impairment to her right upper extremity for the carpal tunnel syndrome. This 5 percent right upper extremity impairment converts to a 3 percent to the body as a whole.

The ALJ found claimant did not suffer any additional injury as a result of the injuries suffered while working for respondent since her return in 1996. The Board acknowledges

⁸ Stein Depo., Ex. 2.

⁹ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

¹⁰ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

¹¹ K.S.A. 44-510e(a).

¹² K.S.A. 44-501.

that claimant had very similar problems after the 1991 injury. However, both Dr. Murati and Dr. Stein found claimant to have suffered additional injuries in her shoulders. Dr. Stein found crepitus bilaterally. He was unable to testify that this crepitus was present after the 1991 injury. The Board finds that claimant also suffered injury to her shoulders as a result of the 2004-2005 injuries. Therefore, the Board also awards claimant a 2.5 percent impairment for each shoulder. This converts to a 1.5 percent impairment to the body as a whole for each shoulder, which, when combined with the upper extremity rating for the carpal tunnel syndrome, results in a 6 percent whole body impairment for the injuries suffered by claimant while working for respondent during her most recent stint of employment. The Award of the ALJ is modified accordingly.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated January 30, 2006, should be, and is hereby, modified to award claimant a 6 percent permanent partial disability to the whole body for the injuries suffered on September 27, 2004, and through a series of injuries suffered through May 15, 2005.

The claimant is granted an award against the respondent, the Boeing Company, and its insurance carrier, Indemnity Insurance Company of North America, for an accidental injury occurring on September 27, 2004, and a series of accidents through May 15, 2005, for a 6 percent permanent partial whole body disability. Claimant is entitled to 24.9 weeks permanent partial disability compensation at the rate of \$449.00 per week, for a total award of \$11,180.10.

As of May 11, 2006, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts already paid.

The Award of the Administrative Law Judge makes no finding regarding attorney fees in this matter. K.S.A. 44-536(b) mandates the "written contract" between the employee and the attorney be filed with the Director for review and approval. Any claim for attorney fees in this matter may be determined by the Director upon the filing of the contract with and approval by the Director.

In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of June, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director